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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANDREW J. HALEY et al., Petitioners, THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;	H034202 (Santa Clara County Super.Ct.No. CV133883)
ANDREW HANTGES, Real Party in Interest.	

Andrew Hantges, real party in interest, sued his attorneys—a law firm and two individuals—in Santa Clara County Superior Court for professional negligence. The two individual defendants, Andrew J. Haley and Andrew S. Pauly (sometimes collectively, defendants), filed a motion to transfer venue. They contended that Santa Clara County was not the proper venue for the action because they both resided in Los Angeles County. Hantges filed opposition and respondent court denied the motion.

Defendants filed a statutory petition for writ of mandate challenging the court's denial of the motion to change venue, pursuant to Code of Civil Procedure section 400.[1]

[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

For the reasons discussed below, we conclude that the court abused its discretion in denying defendants' motion to transfer venue. Accordingly, we will grant the petition for writ of mandate and direct the court to enter an order transferring the case to the Superior Court of California, County of Los Angeles.

PROCEDURAL HISTORY

On February 2, 2009, Hantges filed a complaint against Haley, Pauly, and Greenwald, Pauly, Foster & Miller, a professional corporation (law firm). The complaint stated a single cause of action for professional negligence. Hantges alleged that he hired defendants and the law firm to defend him in another lawsuit, *Lee v. Palm Terrace LLC* (Santa Clara Superior Court case no. 106CV057298; hereafter, the *Lee* litigation); they were negligent in failing to tender the defense of that lawsuit on Hantges's behalf under an insurance policy with Lloyd's of London; and he sustained resulting damages (i.e., "unnecessary attorney fees") of $96,022. The complaint contained the further allegation that Santa Clara County Superior Court was the proper court for the action because "injury to person or damage to personal property occurred in its jurisdictional area."

Defendants thereafter filed a motion to transfer, claiming that such transfer was mandatory because Santa Clara County was not the proper venue for the action.[2] In support of the motion, Haley and Pauly each submitted declarations stating that they had been residents of Los Angeles County for 10 and over 50 years, respectively. Each of them declared that he had not consented to Hantges's filing of the suit in Santa Clara County. Hantges opposed the motion, arguing that venue in Santa Clara County was proper because (1) the contract on which the action was based was to have been performed in Santa Clara County, and (2) he sustained damage to property in that county.

[2] The record is silent as to the law firm's appearance in the case. In his opposition, Hantges states that the law firm answered the complaint and thus consented to venue in Santa Clara County. Defendants do not dispute this assertion in their reply, albeit such appearance by the law firm is irrelevant to the instant petition.

He submitted no declaration in connection with that opposition, other than the declaration of his attorney supporting his request for attorney fees incurred in opposing defendants' motion. The respondent court denied the motion to transfer.

Defendants filed a timely petition for writ of mandate with this court and included in their petition a request to stay the proceedings below. Hantges filed informal opposition to the petition, and defendants filed a reply on May 27, 2009. On June 30, 2009, we ordered respondent court to show cause why a peremptory writ of mandate should not issue as prayed by defendants. In that order, we issued a stay of all trial court proceedings until further court order.[3]

DISCUSSION

I. *Standard of Review*

Pursuant to section 400, a party aggrieved by an order granting or denying a motion to change venue may petition for a writ of mandate requiring trial of the case in the proper court. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 927, fn. 4.) The standard of review for an order granting or denying a motion for a change of venue is abuse of discretion. (*State Bd. of Equalization v. Superior Court* (2006) 138 Cal.App.4th 951, 954.) The court abuses its discretion in denying the motion when venue is mandatory in a county other than the county where the action has been brought. (*Ford Motor Credit Co. v. Superior Court* (1996) 50 Cal.App.4th 306, 309.)

II. *Motion to Transfer Venue*

There are two classifications of civil actions for purposes of determining venue: local actions and transitory actions. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482, fn. 5 (*Brown*).) "To determine whether an action is local or transitory, the court looks to the 'main relief' sought. Where the main relief sought is personal, the action is

[3] In the order, we noted that real-party-in-interest Hantges could file a return in opposition to the petition for writ of mandate within 20 days and that defendants could reply to that return within 20 days after its filing. Hantges did not file a return.

transitory. Where the main relief relates to rights in real property, the action is local. [Citation.]" (*Ibid.*) It is clear that the action here—one for damages resulting from alleged professional negligence—is a transitory action because the relief sought is personal.

In actions that are transitory, the general rule is that venue is proper only in the county of the defendant's residence. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 3:458, p. 3-113; 3:480, p. 3-117; see also *Brown*, *supra*, 37 Cal.3d at p. 483.) As explained by our high court, "The right of a defendant to have an action brought against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by a long line of decisions. The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. If the plaintiff would claim such right he must bring himself within the exception. [Citations.]" (*Kaluzok v. Brisson* (1946) 27 Cal.2d 760, 763-764.) This rule is codified in section 395, subdivision (a), which provides that "[e]xcept as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action."

In instances in which the claim is that venue is proper where the defendant resides, defendant has the burden of showing that he or she resided at the time the action was commenced in the county to which the transfer is sought. (*Sequoia Pine Mills, Inc. v. Superior Court* (1968) 258 Cal.App.2d 65, 67-68.) " 'Where a defendant has made a proper showing of nonresidence, the burden is on the plaintiff to show that the case comes clearly within one of the statutory exceptions to the general rule that actions are triable in the place of the defendant's residence.' [Citation.]" (*California State Parks Foundation v. Superior Court* (2007) 150 Cal.App.4th 826, 833.)

Where the defendant brings a timely motion to transfer, the court is required to transfer venue where it appears that the court designated in the complaint is not the proper court. (§ 396b, subd. (a).) In evaluating the merits of a transfer motion, the court examines the complaint at the time of the making of the motion. (*Brown*, *supra*, 37 Cal.3d at p. 482; *Haurat v. Superior Court* (1966) 241 Cal.App.2d 330, 337 [plaintiff may not circumvent venue requirements by making "a subsequent election of theories by proposed amendments"].) And where the plaintiff contends that the case fits within an exception to the general rule that venue is proper in the county of defendant's residence, any ambiguities in the complaint will be construed against the plaintiff towards the end that the defendant will not be deprived of the right to a trial in the county of his or her residence. (*Neet v. Holmes* (1942) 19 Cal.2d 605, 612; *Bybee v. Fairchild* (1946) 75 Cal.App.2d 35, 36-37.)

Here, defendants met their burden in support of their transfer motion that venue was improper in Santa Clara County under the general rule that venue for transitory actions is the county of defendant's residence. Both Haley and Pauly declared that they had been residents of Los Angeles County for a number of years—and that they were residents of that county when the action was filed. Hantges presented no evidence to controvert these facts relevant to venue.[4]

[4] Hantges cites *Karson Industries, Inc. v. Superior Court* (1969) 273 Cal.App.2d 7 in support of his claim that defendants' motion was properly denied because they failed to negate the propriety of venue in Santa Clara County on all grounds. But in *Karson Industries*, the suit was against a corporate defendant only, the action was for breach of contract, and on the face of the complaint and the law applicable for venue in suits against corporations, there were five possible counties where venue might have been proper. (*Id.* at pp. 8-9.) Here, the transfer motion was brought by two individuals, they both presented uncontroverted evidence that they did not reside in the county where the suit was brought, and on the face of the complaint, there was no possible county where the suit could have been properly venued other than the county of defendants' residence. Thus, *Karson Industries* offers no support for Hantges's position.

Indeed, Hantges offered *no admissible evidence whatsoever* in support of his assertion that venue in Santa Clara County was proper. Nonetheless, he argued that the action was properly brought in Santa Clara County, principally based on the contention that the action was on a contract, the performance of which was to occur in Santa Clara County. In support of this position, he cited section 395, subdivision (a),[5] which reads in relevant part: "Subject to subdivision (b), if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary." Hantges's argument is without merit.

First, contrary to Hantges's claim, the action he brought in Santa Clara County was *not* an action on a contract. Rather, it is plain that the case is one for professional negligence because (1) the caption of the complaint identifies the claim as one for "Professional Negligence"; (2) page three of the complaint indicates that the cause of action attached is one for "Professional Negligence"; and (3) the attachment to the form complaint is captioned "General Negligence" and includes the allegation that "[d]efendant(s) . . . breached the duty of professional care as an attorney(s) owed to Plaintiff." (*Sic*.) The complaint does not allege the existence of a contract between the parties or that the basis of the action is a claim for breach of contract. Although a claim by a client that his or her attorney committed malpractice generally may be asserted as both a negligence claim and one for breach of contract (see *Neel v. Magana, Olney, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187, 180-182), Hantges here elected to pursue

[5] Hantges in his opposition filed below actually cited subdivision (b) of section 395; however, his quote derives from subdivision (a) of section 395.

only a tort claim. We evaluate the transfer motion by reference to the complaint in existence at the time the motion is made (*Brown, supra*, 37 Cal.3d at p. 482), and we construe any pleading ambiguities against the plaintiff towards the end that the defendant will not be deprived of the right to a trial in the county of his or her residence. (*Neet v. Holmes, supra*, 19 Cal.2d at p. 612; *Williamson v. Pacific Greyhound Lines* (1944) 67 Cal.App.2d 250, 252-254 [complaint construed against plaintiff in determining whether gravamen of action was contract or tort for venue purposes].) Based upon these principles, Hantges's claim of an exception to the general rule of venue in the county of defendant's residence clearly fails.

Second, even were we to consider Hantges' contract argument on its merits, it nonetheless is not persuasive. Under Hantges's unpleaded theory, the alleged performance of legal services constituted a breach of contract, and that contract called for performance in Santa Clara County because it referenced that the attorneys would defend him in the *Lee* litigation that was pending in that county. The contract, however—a copy of which is attached to the Pauly declaration—clearly identifies the contracting parties to be Hantges (among other clients), on the one hand, and the law firm, as attorneys, on the other hand. Neither Haley nor Pauly was a contracting party. Therefore, regardless of whether a contract action against the law firm (had it been pleaded) might have been properly venued in Santa Clara County, defendants here were entitled to have the action transferred to Los Angeles County, their county of residence. As the Supreme Court has explained, "it is well recognized that when a plaintiff brings an action against several defendants, both individual and corporate, in a county in which none of the defendants reside, an individual defendant has the right to change venue to the county of his or her residence. This is true even though the action was initially brought in a county where the corporate defendants may be sued under Code of Civil Procedure section 395.5. [Citations.]" (*Brown, supra*, 37 Cal.3d at pp. 482-483, fn. 6; see also *Mosby v. Superior Court* (1974) 43 Cal.App.3d 219, 226 [where venue is proper against corporate defendant

but action is not filed in county of residence or principal place of business of any defendant, individual has right to change venue to county of his or her residence].) Therefore, although venue in Santa Clara County might have been proper—*if* Hantges had (1) sued only the law firm, (2) alleged a breach of contract claim, and (3) established that the contract was to have been performed in Santa Clara County—there is no merit to Hantges's contention that venue was proper against defendants based upon the contract exception specified in section 395, subdivision (a).

Hantges also argued a theory—one apparently alternative to his contract exception argument—that venue in Santa Clara County was proper because he incurred injury to property in that county. That argument is likewise meritless. Hantges relies on another exception to the general rule that a defendant is entitled to be sued in the county in which he or she resides: "If the action is for injury to person or personal property or for death from wrongful act or negligence, the superior court in either the county where the injury occurs or the injury causing death occurs or the county where the defendants, or some of them reside at the commencement of the action, is a proper court for the trial of the action." (§ 395, subd. (a).) This statutory exception is one that is construed narrowly (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 3:498, p. 3-121) and is inapplicable here. The exception "applies only to actions for *physical* injury. Actions for injury to reputation, or even for mental or emotional distress, are triable only at defendant's residence. [Citations.]" (*Ibid.*) Hantges cites no authority (nor does any such authority exist) to support his contention that this exception should be construed broadly to allow for the economic damages he allegedly sustained as a result of defendants' professional negligence to be considered "injury to person or personal property."

In *Carruth v. Superior Court* (1978) 80 Cal.App.3d 215, 217-218 (*Carruth*), the defendants in a malicious prosecution action (an attorney and law partnership of which he was a member) unsuccessfully moved to transfer venue to the county where the attorney

resided. The appellate court granted defendant's petition for writ of mandate, concluding, inter alia, that an action for malicious prosecution was not one "for injury to person" as provided under section 395, and the fact that the plaintiff sought emotional distress damages did not alter that conclusion. (*Carruth*, at pp. 219-220.) It found that a contrary holding "would be in clear derogation of the right of a defendant to have an action brought against him [or her] tried in the county of his [or her] residence, 'an ancient and valuable right, safe-guarded by statute and supported by a long line of decisions.' [Citation.]" (*Id.* at p. 220; see also *Monk v. Ehret* (1923) 192 Cal. 186, 192-193 [false imprisonment damages not "injury to person"]; *Graham v. Mixon* (1917) 177 Cal. 88, 93 [damages for defamation not "injury to person"].)

Clearly, Hantges's suit for professional negligence is not an "action . . . for injury to person or personal property or for death from wrongful act or negligence" within the meaning of section 395, subdivision (a). There is therefore no basis for his assertion that venue in Santa Clara is proper because he is seeking personal injury or property damages allegedly suffered in that county.

Defendants in their motion to transfer met their burden of establishing that at the time the action for professional negligence was instituted, they did not reside in Santa Clara County, but rather in Los Angeles County. Defendants' county of residence was presumptively the proper place of venue for this action. Hantges submitted no evidence whatsoever to rebut that presumption. And none of the statutory exceptions under which it would be proper for the action to be tried in a county other than that of defendants' residence apply. We therefore conclude that the trial court abused its discretion in denying the motion to transfer venue.

DISPOSITION

Respondent superior court erred in denying defendants' motion to transfer venue. Accordingly, let the peremptory writ of mandate issue directing the superior court to

vacate its order of April 21, 2009, and to enter a new order granting defendants' motion to transfer venue to the Superior Court for the County of Los Angeles.

Duffy, J.

I CONCUR:

Premo, Acting P.J.

Elia, J.